Supreme Court, U. S.
FILED
FEB 27 1976
MICHAEL RODAK, JR., CLERK

Nos. 75-251 and 75-283

In the Supreme Court of the United States

OCTOBER TERM, 1975

GARLAND M. FITZPATRICK, ET AL., PETITIONERS

v.

FREDERICK BITZER, ET AL.

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v.

DONALD MATTHEWS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Congress is empowered by the Fourteenth Amendment to authorize the granting of monetary awards in suits by private individuals against state officials for alleged employment discrimination.

2. Whether, if the private plaintiffs prevail in such a suit, the Eleventh Amendment bars an award to them of reasonable attorney's fees as part of the costs.

INTEREST OF THE UNITED STATES

The United States has equal employment opportunity enforcement responsibility under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.* In particular, the Attorney General has authority under Sections 706(f) and 707 of the Act, 42 U.S.C. (Supp. IV) 2000e–5(f) and 2000e–6, to bring civil actions against state and local governments and governmental agencies which have allegedly engaged in unlawful employment practices. Resolution of the question whether private individuals may recover retroactive benefits against state governments will substantially affect the Attorney General's enforcement responsibilities. The magnitude of those responsibilities will also be affected by whether private plaintiffs may be awarded attorney's fees, since the private right of action is "an essential means of obtaining judicial enforcement" of civil rights statutes. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209.

STATEMENT

1. Petitioners [1] are present and past male employees of the State of Connecticut. They brought this class action in the district court, alleging that certain provisions of the State's statutory scheme for the retirement of its employees discriminated against men on

[1] For convenience, we refer to the petitioners in No. 75-251—the plaintiffs below—as "petitioners." References to the "petition" are to their petition and references to the "cross-petition" are to the petition filed in No. 75-283 by the state officials, defendants below.

account of their sex, in violation of Title VII of the Civil Rights Act of 1964. The district court ruled in their favor, holding that the Connecticut State Employees' Retirement Act violates Title VII's prohibition against sex-based discrimination in employment insofar as it allows female employees having 25 or more years of state service the right to retire five years earlier than similarly situated male employees, and accords female employees with less than 25 years of service greater retirement benefits than similarly situated male employees (Cross-Pet. App. 2a–25a).[2]

The court enjoined the defendant state officials from continuing to operate the State's retirement scheme in a sexually discriminatory manner (*id.* at 24a), but it denied petitioners' requests for an award of retroactive retirement benefits to compensate them for financial losses suffered as a result of the state's discriminatory practices, and for an award of reasonable attorney's fees as a part of the costs (*id.* at 20a–23a). The court ruled, in effect, that application here of the express statutory authorization for both the monetary relief requested and awards of attorney's fees (Section 706(g) and (k), 42 U.S.C. (Supp. IV) 2000e–5(g) and 42 U.S.C. 2000e–5(k)) would violate the Eleventh Amendment (*id.* at 23a).

[2] In particular, the court found that four of the petitioners now employed by the State would not normally be able to retire until five years after similarly situated female employees, and that two of the petitioners, now retired from state employment, receive less in retirement benefits than similarly situated females (Cross-Pet. App. 10a–11a). The applicable state provisions are described in some detail in the district court's opinion (*id.* at 6a–7a).

2. On petitioners' appeal,[3] the court of appeals affirmed in part and reversed and remanded in part (Pet. App. 1a–24a). It held that, although Congress intended to authorize the district courts to award back pay or other retroactive monetary relief against state employers in actions brought by private individuals under Title VII (*id.* at 14a–17a), such relief is barred by the Eleventh Amendment (*id.* at 17a–23a). The court ruled that the power of Congress to enforce the Fourteenth Amendment does not include the power to subject the states to "a private federal action for retroactive damages" (*id.* at 19a), at least when "Congress * * * has at its disposal various methods other than private federal damage suits for enforcing Fourteenth Amendment rights" (*id.* at 20a).[4]

The court of appeals held that there was no constitutional barrier to an award of attorney's fees, however, since such an award would have only an "ancillary effect" on the state treasury of the kind permitted under *Edelman* v. *Jordan,* 415 U.S. 651, 667–668. Accordingly, the court remanded the case to the district court for a determination whether and to what extent attorney's fees should be allowed (*id.* at 24a).

[3] The state officials did not appeal.

[4] The court stated that other available methods of enforcement include (Pet. App. 21a–22a): (1) prospective injunctive relief obtained in suits by private individuals; (2) suits for injunctive and monetary relief by the United States; and (3) possible congressional authorization of private suits for injunctive and monetary relief in state courts.

SUMMARY OF ARGUMENT

1. In amending Title VII in 1972 Congress clearly manifested its intent to create a cause of action on behalf of state employees complaining of illegal discrimination in employment. No distinction was drawn between prospective injunctive and retroactive monetary relief; the states, no less than private employers, were meant to be subject to Title VII's "twin statutory objectives" of deterring employment practices of dubious legality and of fully compensating persons for injuries suffered on account of unlawful employment discrimination. See *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 421. "There is nothing on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between" injunctive and back pay relief. *Id.* at 423.

The court below, however, while acknowledging Congress' intent that the states be fully answerable in federal court for employment discrimination, in effect ruled unconstitutional so much of Title VII as authorizes suit against a state by an individual seeking back pay or other retroactive monetary relief. In so doing the court misperceived the constitutional allocation of power between the federal and state governments, and, through an erroneous balancing process, took away powers unequivocally committed to the federal government by the Fourteenth Amendment.

That Amendment enlarged the power of the federal government and correspondingly contracted the au-

thority of the states. Like the Thirteenth and Fifteenth, it was designed in large measure to prohibit racial discrimination and to assure all persons equal treatment under law. The states had been parties to the abuses that the Amendment was intended to correct, and it was clear to all at the time of its passage that Section 5 of the Amendment, by giving Congress "power to enforce, by appropriate legislation, the provisions of this article," took from the states the autonomy that had previously enabled them, with impunity, to deprive individuals of rights solely on the basis of race. The Fourteenth Amendment, in short, was the "centerpiece" of "the new structure of law" reflecting "the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment" (*Mitchum* v. *Foster,* 407 U.S. 225, 238–239).

It follows that, as to actions authorized by Congress under that grant of power, the ratification of the Fourteenth Amendment abrogated whatever immunity to suit in federal court the states may theretofore have enjoyed. In reaching a contrary result the court below reasoned that it properly balanced and gave fair effect to both the Eleventh and Fourteenth Amendments. But the Fourteenth, remedial in purpose and aimed at state sanctioned and perpetrated abuses, was meant not to balance the Eleventh but *pro tanto* to override it. As this Court observed in *Ex parte Virginia,* 100 U.S. 339, 346, a decision closely contemporaneous with the enactment of the Fourteenth Amendment, legislation enacted thereunder is within the domain of congressional power even if it "is restrictive of what the

State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty."

The rationale of *Ex parte Virginia* was recently reaffirmed in *South Carolina* v. *Katzenbach,* 383 U.S. 301, in which the sweeping provisions of the Voting Rights Act of 1965[5] were challenged on the ground that they unconstitutionally invaded the powers of the states. This Court dismissed the bill of complaint, ruling that the remedies authorized by the Act—many of which are far more intrusive upon state sovereignty than the back pay remedy authorized by Title VII[6]—were within Congress' power to enact under the Fifteenth Amendment. "The gist of the matter," said the Court, in language equally applicable to the Fourteenth Amendment and the instant case, "is that the Fifteenth Amendment supersedes contrary exertions of state power," and Section 2 of that Amendment, virtually identical in language and purpose

[5] 79 Stat. 437, as amended, 42 U.S.C. 1973 *et seq.*

[6] *E.g.*, Section 5, 42 U.S.C. 1973c, requiring covered states to submit any changes in voting laws to the Attorney General for clearance, or to the United States District Court for the District of Columbia for a declaratory judgment, before they may take effect. See *Connor* v. *Waller*, 421 U.S. 656; *Georgia* v. *United States*, 411 U.S. 526.

to Section 5 of the Fourteenth, gave Congress "full remedial powers to effectuate" its terms (383 U.S. at 325, 326).

Congress accordingly acted within its power to effectuate the Fourteenth Amendment in subjecting the states to the terms of Title VII to the same extent as private employers. The remedies are no less important to the goals of the statute than the rights conferred, and no more beyond Congress' power to prescribe. As this Court recently noted in *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 421 (footnote omitted), the back pay remedy provided by Title VII is integral to "the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Thus the decision below should be reversed and the case remanded for a determination of the merits of petitioners' claims for retroactive monetary relief.

This result is not inconsistent with *Edelman* v. *Jordan,* 415 U.S. 651. In that case the principal issue was whether an action to recover welfare benefits wrongfully withheld was a suit against state officials under the doctrine of *Ex parte Young,* 209 U.S. 123, or a suit against the state itself. The suit was held to be against the state itself, and Congress was found not to have authorized it. The question presented here, regarding Congress' power to enforce the Fourteenth Amendment over a state claim of sovereign immunity, therefore did not arise and was not decided.

2. Title VII expressly authorizes the district court to allow the prevailing party "a reasonable attorney's fee as part of the costs" of any enforcement action brought under that statute's provisions. Section 706(k), 42 U.S.C. 2000e–5(k). Such an award has only "an ancillary effect on the state treasury [and] is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*" (*Edelman* v. *Jordon, supra,* 415 U.S. at 668). Unlike "an accrued monetary liability" which may be "in practical effect indistinguishable in many respects from an award of damages" (*id.* at 664, 668), an award of attorney's fees is not intended to compensate the plaintiff for past injuries or punish the state for past malfeasance. Rather, it is simply an incidental cost of the litigation which the state may be made to bear "just as any other litigant." *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70, 77; *Souza* v. *Travisono,* 512 F.2d 1137 (C.A. 1). This Court acknowledged as much in affirming *Sims* v. *Amos,* 340 F. Supp. 691 (M.D. Ala.), summarily affirmed, 409 U.S. 942, over the state's protest that its sovereign immunity precluded an award of counsel fees against it. Thus, the court of appeals was correct in ruling that attorney's fees may be taxed against the state and its decision in this regard should be affirmed.

Even if this Court were to decide, however, that an award of attorney's fees does not fall within the rationale of *Ex parte Young,* but more closely resembles

the sort of relief that implicates the state's sovereignty for purposes of the Eleventh Amendment, the judgment below should nonetheless be upheld since, for the reasons stated in point 1, *supra,* Congress has the power under the Fourteenth Amendment to provide for such an award. "[T]he private right of action remains an essential means of obtaining judicial enforcement of Title VII" (*Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 45), and this is an instance in which "Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation" (*Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 263). At the outset of a private action to enforce Title VII the plaintiff cannot accurately predict whether and to what extent he may recover retroactive compensation for injuries suffered through past discrimination. The possibility that attorney's fees will offset or even exceed any judgment recovered may inhibit suit and substantially impede enforcement of the "congressional command that each employee be free from discriminatory practices" (*Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 51). Actions for injunctive relief alone would be likely to be discouraged entirely. The power of the district court to award attorney's fees is thus integral to enforcement of the statute and the guarantees of the Fourteenth Amendment, and accordingly Congress did not exceed its constitutional authority in providing for such awards.

ARGUMENT

I

CONGRESS DID NOT EXCEED ITS POWERS UNDER THE FOURTEENTH AMENDMENT IN PROVIDING IN TITLE VII FOR PRIVATE ACTIONS AGAINST STATE EMPLOYERS FOR RETROACTIVE MONETARY RELIEF

Parden v. *Terminal Railway Co.,* 377 U.S. 184, 187, marked "the first time in this Court [that] a State's claim of immunity against suit by an individual [met] a suit brought upon a cause of action expressly created by Congress." There the plaintiff sought damages under the Federal Employers' Liability Act[7] ("FELA") for injuries sustained while employed by the defendant state-owned-and-operated railroad. The state's defense of immunity, said the Court, presented two questions: "(1) Did Congress in enacting the FELA intend to subject a State to suit in these circumstances? (2) Did it have the power to do so, as against the State's claim of immunity?" (*id.* at 187). Both inquiries were answered in the affirmative and the plaintiff was held entitled to maintain his suit. See *id.* at 187–198.

In only two cases since *Parden* has this Court discussed similar state claims of immunity, and in both of them the plaintiffs failed to clear the initial hurdle of showing that Congress intended to enable them to sue. In *Employees* v. *Department of Public Health and Welfare of Missouri,* 411 U.S. 279, 285, where the

[7] 45 U.S.C. 51–60.

plaintiffs sought overtime compensation allegedly due them under the Fair Labor Standards Act of 1938,[8] the Court found "not a word in the history of the [Act] to indicate a purpose of Congress" to create a cause of action on behalf of private plaintiffs against the state. And in *Edelman* v. *Jordan,* 415 U.S. 651, 672, involving a claim for welfare benefits wrongfully withheld, the Court ruled that "the threshold fact of congressional authorization to sue" the state under the Social Security Act[9] was absent. In these decisions, then, the question whether Congress had the power to do something it evinced no intention of doing was properly not addressed.[10] And in *Parden,* although Congress was held not only to have intended to subject the states to suit but also to possess the power to do so, its power was said to derive, not from the Fourteenth Amendment, which was not in issue, but from the state's acquiescence to suit as evidenced by its conduct subsequent to passage of the FELA. See 377 U.S. at 192; *Employees* v. *Department of Public Health and Welfare of Missouri, supra,* 411 U.S. at 280–281, n. 1; *Edelman* v. *Jordan, supra,* 415 U.S. at

[8] 29 U.S.C. 216(b).

[9] 42 U.S.C. 1381–1385.

[10] The court of appeals erred in suggesting (Pet. App. 22a–23a) that in *Edelman* the Court may have foreclosed the Fourteenth Amendment argument made here. As we discuss *infra*, pp. 37–40, in overruling certain prior decisions involving Fourteenth Amendment claims the Court was construing the reach of *Ex parte Young*, 209 U.S. 123, and in any event overruled those cases only "to the extent that they are inconsistent with our holding today" (415 U.S. at 671), which never once mentioned the Fourteenth Amendment.

672. Accordingly, none of these cases involved the issue whether a state claim of sovereign immunity limits Congress' power to enforce the Fourteenth Amendment by providing for suits against a state by individuals seeking monetary relief. That is the question for decision here for, as we now show, the court below correctly concluded that in amending Title VII to apply to state employees Congress unmistakably intended to subject the states to such suits.

A. THE 1972 AMENDMENTS TO TITLE VII PROVIDE FOR THE AWARD OF MONETARY RELIEF IN PRIVATE SUITS AGAINST PUBLIC EMPLOYERS

Under the approach to state sovereign immunity cases set forth in *Parden, supra,* the first inquiry to be made—what did Congress intend—is principally a question of statutory construction, whereas the second—what power has Congress—is a constitutional issue and thus should be reached only if resolution of the first question is not dispositive of the case. Accordingly, although respondents here do not appear to contest the court of appeals' ruling that Congress in 1972 meant to extend the rights and remedies of Title VII to state employees, to allay any possible doubt on this score we now show that the court below decided this issue correctly.

As originally enacted, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. 2000e *et seq.*, prohibited discrimination in employment on account of race, sex, religion, or national origin, but only by private employers: state and local governments were

specifically excluded from coverage.[11] The Act established the Equal Employment Opportunity Commission (EEOC), and empowered it to investigate and to attempt to conciliate charges of discrimination in employment, although not to bring suit itself. Rather, enforcement was committed to the aggrieved employee, who was given the right to bring an action against his employer in federal district court after satisfying the procedural prerequisites of the Act (Section 706 (a)–(e), 42 U.S.C. 2000e–5(a)–(e)), and to the Attorney General, who was authorized to bring suit against private employers who allegedly engaged in a pattern or practice of discrimination (Section 707, 42 U.S.C. 2000e–6). The remedies available to an individual plaintiff who succeeded in showing that his employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice" included not only injunctive relief against continuation of the unlawful practice, but also affirmative relief "as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay * * *" (Section 706(g), 42 U.S.C. 2000e–5(g)).

In 1972 Congress enacted major amendments to Title VII. State and local governments, governmental agencies, and political subdivisions were included

[11] The term "employer" was defined in Section 701(b), 42 U.S.C. 2000e(b), to mean "a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year * * * but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian Tribe, or a State or political subdivision thereof * * *."

within the definition of the term "person," and the exclusion of states and political subdivisions thereof from the definition of "employer" was stricken from the Act (86 Stat. 103, 42 U.S.C. (Supp. IV) 2000e (a), (b)). The EEOC was given power to bring suit in a federal district court in cases involving discrimination by private employers, and the Attorney General was authorized to bring such suits against public employers.[12] The amendments not only retained the right of individuals to sue on their own behalf, but also expanded the class of individuals covered to include persons aggrieved by public employers.[13]

[12] The rationale for this allocation of authority between the Attorney General and the EEOC does not appear in the Conference Report accompanying the version of the bill finally enacted. See S. Conf. Rep. No. 92–681, 92d Cong., 2d Sess. 17–18 (1972). Senator Williams, however, the floor manager of the Senate bill, supported such a division of authority when the version of the bill then under consideration would have permitted the EEOC to issue cease and desist orders. He stated that an alternative procedure of permitting the Attorney General to sue following failure of conciliation would provide "the necessary power to achieve results without the needless friction that might be created by a Federal executive agency issuing orders to sovereign States * * *" (118 Cong. Rec. 1816 (1972)). In any event, there is no indication that the ultimate congressional determination to empower the Attorney General rather than an administrative agency to sue state employers contained any implication as to the rights of private individuals to sue state employers.

[13] Section 706(f)(1), 42 U.S.C. (Supp. IV) 2000e–5(f)(1), provides that if upon satisfaction of certain procedural prerequisites "the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party,

Congress also amended the remedial provisions of the Act to make it clear that the affirmative action to which employers might be subject was "not limited to" reinstatement, hiring, or an award of back pay, but included "any other equitable relief as the court deems appropriate" (Section 706(g), 42 U.S.C. (Supp. IV) 2000e–5(g)).[14] Congress did not, however, limit the availability of monetary relief to suits against private employers. Given this evidence of Congress' close attention to Section 706(g), there is no reason to suppose that its terms should not be given their plain meaning: in a suit by an aggrieved individual against an employer, whether private or public, the district court is empowered to order the reinstatement or hiring of employees, with back pay, or any other equitable relief the court deems appropriate.

The legislative history of the 1972 Amendments fully supports this conclusion. The bill reported by the House Committee on Education and Labor provided for the expansion of Title VII to include both state and local government employers and the federal government. H.R. Rep. No. 92–238, 92d Cong., 1st Sess. 33 (1971). Although this provision did not appear in

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the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."

[14] Section 706(g) was also amended to limit the employer's period of liability for back pay to two years prior to the employee's filing of a complaint with the EEOC.

the bill that finally left the House, it was reinserted in conference committee and the Report of the House Committee is therefore relevant (*id.* at 17):

> Presently approximately 10.1 million persons are employed by State and local governmental units. This figure represents an increase of over 2 million employees since 1964. Indications are that the number of employees in State and local government will continue to increase, perhaps even more rapidly. Few of these employees, however, are afforded the protection of an effective forum to assure equal employment. The bill amends section 701 of the Civil Rights Act of 1964 (section 2 of the bill) to include State and local governments, governmental agencies and political subdivisions within the definition of an "employer" under Title VII. All State and local government employees would under the bill have access to the remedies available under the Act.
>
> In a report released in 1969, the U.S. Commission on Civil Rights examined equal employment opportunity in public employment in seven urban areas located throughout the country—North as well as South. The report's findings indicate that widespread discrimination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices.
>
> * * * * *
>
> This widespread discrimination is evidence that State and local governmental units have not instituted equal employment opportunity

> required by the national policy to eliminate discrimination in employment.

In addition to extending Title VII to state and local governments, the House Committee bill also gave the EEOC the power to issue cease and desist orders. The bill substituted on the floor of the House granted the EEOC power to institute suits in federal court rather than to issue cease and desist orders, and did not include coverage of state and local governments. 117 Cong. Rec. 32111 (1971).

The bill reported by the Senate Committee on Labor and Public Welfare, however, like the House Committee bill, extended Title VII to state and local governments. S. Rep. No. 92–415, 92d Cong., 1st Sess. 2 (1971). The Senate Committee reported (*id.* at 9) that "employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy" but that "[f]ew of these employees, however, are afforded the protection of an effective Federal forum for assuring equal employment opportunity."

A proposed amendment to the Senate bill to continue the exemption of public employers was defeated by a vote of 59 to 16. 118 Cong. Rec. 1840 (1972). Speaking in opposition to the amendment, Senator Williams, the floor manager of the Committee bill, stated (118 Cong. Rec. 1815 (1972)):

> Mr. President, one of the most vital provisions of S. 2515 is the part which would amend section 701 to broaden the jurisdictional coverage of title VII of the Civil Rights Act of 1964

> to include State and local government employees. * * *
>
> At this time in our country's history, it should be beyond question that the employees of State and local governments are entitled to the same benefits and protections in equal employment as are employees in the private sector. In fact, the well-documented and widespread discrimination among State and local government employees is a shameful condition that should be eliminated wherever and whenever possible.

The substitute bill ultimately passed by the Senate retained the extension of Title VII to state and local government employers (118 Cong. Rec. 4944 (1972)); at the ensuing Conference Committee the House Conferees acceded to the Senate version (S. Conf. Rep. No. 92–681, 92d Cong., 2d Sess. 15 (1972); H.R. Conf. Rep. No. 92–899, 92d Cong., 2d Sess. 15 (1972)); and the bill recommended by the Conference Committee was subsequently adopted (118 Cong. Rec. 7170, 7572–7573 (1972)).

In sum, the plain language and legislative history of the statute unequivocally reveal the intention of Congress to accord employees of state and local governments all of the protection available to private employees under Title VII. As the court below noted (Pet. App. 17a), "[t]o suggest otherwise would be to hold Congress to a degree of legislative specificity it could not and does not customarily meet." Prospective injunctive relief and back pay awards were intended to be equally available: "There is nothing on the face of the statute or in its legislative history that justifies

the creation of drastic and categorical distinctions between those two remedies" (*Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 423). The question remaining, accordingly, is whether Congress' intentions reached beyond its constitutional powers.

B. THE FOURTEENTH AMENDMENT EMPOWERED CONGRESS TO ENFORCE ITS PROVISIONS AGAINST THE STATES NOTWITHSTANDING CLAIMS OF SOVEREIGN IMMUNITY

Congress perceived its power to subject the states to suit by individuals under Title VII to derive from the Fourteenth Amendment.[15] The court below, while acknowledging (Pet. App. 19a) that "legislation en-

[15] The House Committee Report noted (H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 19 (1971)):

"The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which must directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination.

"Legislation to implement this aspect of the Fourteenth Amendment is long overdue * * *."

See also S. Rep. No. 92-415, 92d Cong., 1st Sess. 10-11 (1971).

Senator Javits, in opposing the proposed amendment to exclude state and local employers from Title VII coverage (see p. 18, *supra*), stated (118 Cong. Rec. 1839 (1972)):

"Mr. President, it is very important, as we are about to vote on this amendment, that we recognize that of all the provisions in this bill, this has the most solemn congressional sanction, because it is based not on the commerce clause, which relates to the relationships between individuals as well as with governments, but is based on the 14th amendment. This is a paramount right which is created for all Americans."

forcing individual rights under the Fourteenth Amendment must to some extent subject states to private suits," concluded that Congress' power did not extend to providing for remedies in the form of monetary relief. We submit, to the contrary, that the shift in the balance of power between the federal government and state goverments occasioned by the Fourteenth Amendment involved no such distinction between rights and remedies. Indeed, the judgment below recalls the situation that in large degree gave rise to the Fourteenth Amendment: the rights to equal employment opportunity that Congress has declared are to be enjoyed by all workers would have only hortatory effect in public employment if the remedies Congress found essential to their enforcement were unavailing against the states.

Section 1 of the Fourteenth Amendment by its terms expressly restricts the powers of the states. After prescribing the requisites for United States citizenship, it declares:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These words, taken alone, might be construed merely to empower the federal government, through the judiciary, to strike down offending state statutes and regulations. But the plan of the Amendment goes further. Section 5 provides that "[t]he Congress shall

have *power to enforce,* by appropriate legislation, the provisions of this article" (emphasis added). At the time of its enactment [16] it was well understood, by both advocates and opponents, that this provision would result in a substantial realignment of the federal-state relationship that had theretofore existed.[17]

The opponents of the Civil War Amendments repeatedly expressed the understanding that the Amendments, and the Fourteenth Amendment in particular, would transfer power from the states to the federal government and diminish state sovereignty. For example, Congressman John A. Nicholson, objecting to the Fourteenth Amendment, said (Cong. Globe, 39th Cong., 1st Sess. 2080 (1866)):

> Thus we possess a system of government, which, to a foreign observer, may appear artificial and complex, but which to us, who are furnished with the key, is simple in the extreme. That key is the jealousy which has been apparent through all our history, for the right of each State to control its own domestic affairs, and the firmness with which that right has always been maintained.
>
> From all these various conflicting causes harmony has been evoked; and the most perfect equilibrium is presented to our view in the

[16] The Fourteenth Amendment was proposed by Congress in 1866 and ratified in 1868.

[17] We have set forth in the Appendix, *infra*, pp. 51–64, relevant portions of the House and Senate debates on the Reconstruction Amendments, and implementing legislation, relating to Congress' understanding of the impact of these Amendments upon the relationship between the states and the federal government.

> equal distribution of the Federal powers, in the limitation upon State and Federal power, and the line that is drawn between them; like that huge mass of rock which nature has so nicely poised that a child's hand can disturb its balance, but a giant's strength could not move it from its base.
>
> That nicely adjusted balance is now, by this amendment, to be permanently overthrown. The line of demarkation between State and Federal power, which has been already too much obscured by the great latitude of construction given of late to the several grants of power, is now to be entirely obliterated.

Congressman Samuel S. Cox, speaking in opposition to the Thirteenth Amendment, asked (Cong. Globe, 38th Cong., 2d Sess. 242 (1865)):

> Do you not break down, by this amendment, the distinction between the spheres of the State and national Governments, which is characteristic of our system, as old as our Union? [18]

Many of the proponents of the Amendments acted out of a concern that the national government lacked power to prevent the states from depriving persons of the civil rights and liberties that the unamended Constitution was thought already to have guaranteed.[19]

[18] See also remarks of Congressman Chilton A. White, Appendix, *infra*, at 51; remarks of Congressman Andrew J. Rogers, *id.* at 52–53; remarks of Congressman Robert S. Hale, *id.* at 53–54; remarks of Congressman Thomas T. Davis, *id.* at 54–55; further remarks of Congressman Samuel S. Cox, *id.* at 51–52; remarks of Senator Garrett Davis, *id.* at 62.

[19] Although the Constitution of the United States established a federal government of enumerated powers (*M'Culloch* v. *Mary-*

But whether or not the substantive terms of the Amendments actually deprived the states of any power that had ever rightfully been theirs,[20] there could be no mistaking the conferral upon Congress of the power, "by appropriate legislation," to enforce those substantive guarantees notwithstanding state claims of sovereignty. Indeed, the proponents of the Amendments repeatedly emphasized that an expansion of congressional authority was the very purpose of the Amendments, and that such a realignment of the distribution of authority between the federal and state governments was within the power of the citizenry to effect through the process of constitutional amendment.[21] For example, Congressman John A. Bingham, who drafted what are now the first and fifth sections of the Fourteenth Amendment, stated (Cong. Globe, 39th Cong., 1st Sess. 1088–1089 (1866)):

> The proposition pending before the House is simply a proposition to arm the Congress of the

land, 4 Wheat. 316), the fear most often expressed during its ratification was that the federal powers would encroach upon the rights of citizens. See *Barron* v. *Mayor and City Council of Baltimore*, 7 Pet. 243, 250. These concerns led to the passage of the Bill of Rights, which limited the power of the federal government only. *Barron* v. *Mayor and City Council of Baltimore*, *supra*, 7 Pet. at 250. The Tenth Amendment made explicit the limitations of federal power by reserving to the states or the people "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States * * *."

[20] See remarks of Congressman Thaddeus Stevens, Appendix, *infra*, at 57; remarks of Congressman John A. Bingham, *id.* at 59–60; remarks of Senator Jacob M. Howard, *id.* at 60–61; remarks of Senator Luke P. Poland, *id.* at 61–62; remarks of Congressman Jehu Baker, *id.* at 62.

[21] *E.g.*, remarks of Congressman Anson Herrick, Appendix, *infra*, at 52.

> United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. * * *
>
> * * * * *
>
> But the gentleman reiterates the old cry of State rights, and says "You are impairing State rights." I would like to know, and when the gentleman comes to make another argument on this subject, I respectfully ask him to inform us whence he derives the authority for supposing, if he does so suppose, that any State has the right to deny to a citizen of any other State any of the privileges or immunities of a citizen of the United States. And if a State has not the right to do that, how can the right of a State be impaired by giving to the people of the United States by constitutional amendment the power by congressional enactment to enforce this provision of their Constitution?

In explaining the relationship between the first and fifth sections of the Amendment, Senator Jacob M. Howard, a member of the Joint Committee on Reconstruction, which reported out the amendment, said (Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)):

> The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end.

> This is done by the fifth section of this amendment, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.[22]

In short, it was well understood that upon its passage the Fourteenth Amendment would not only explicitly deprive the states of authority to interfere with certain fundamental civil rights, but also expressly arm the Congress with the power to enforce its provisions "by appropriate legislation" notwithstanding objections by the states of alleged interference with their sovereign prerogatives. This realignment of the federal-state relationship and the broad enforcement powers conferred upon Congress were recognized by this Court in a case decided shortly after the Amendment's adoption, *Ex parte Virginia,* 100 U.S. 339. In that case a state judge, arrested under a federal statute making it a crime to exclude blacks from grand and petit juries, sought *habeas corpus* on the ground that the statute was beyond Congress' power to enact under the Fourteenth Amendment. The Court began by explaining that "[o]ne great purpose" of both the Thirteenth and

[22] See also remarks of Congressman Thaddeus Stevens, Appendix, *infra*, at 57; remarks of Congressman John M. Broomall, *id.* at 57–58; remarks of Congressman Thomas D. Eliot, *id.* at 58; further remarks of Senator Jacob M. Howard, *id.* at 60–61; remarks of Senator Luke P. Poland, *id.* at 61–62; remarks of Congressman John A. Bingham, *id.* at 59–60.

Fourteenth Amendments was to assure equal civil rights to blacks and to this end "[t]hey were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress" (*id.* at 344–345). The right to equal protection of the laws accorded by the Fourteenth Amendment, it was said, was "placed by the amendment under the protection of the general government and guaranteed by it"; furthermore, "this protection and this guarantee, as the fifth section of the amendment expressly ordains, may be enforced by Congress by means of appropriate legislation" (*id.* at 345). The Court then pointed out the impact of Section 5, in language squarely addressed to the powers of enforcement thereby conferred upon Congress (*id.* at 345–348; italicized emphasis in original; boldface emphasis added):

> All of the amendments derive much of their force from [the provisions empowering Congress to enact "appropriate legislation"]. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in

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view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. This extent of the powers of the general government is overlooked, when it is said, as it has been in this case, that the act [forbidding exclusion of black jurors] interferes with State rights. * * * [I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if these powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of

the governmental powers of the States. It is carved out of them.

* * * * *

* * * Were it not for the fifth section of [the Fourteenth Amendment], there might be room for argument that the first section is only declaratory of the moral duty of the State * * *. * * * **But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete.**

The significance of the shift in federal-state power caused by the Civil War Amendments, and the broad construction of Congress' power to enforce the terms of those Amendments as expressed in *Ex parte Virginia*, have been reiterated and elaborated in recent decisions of this Court. In *Mitchum* v. *Foster*, 407 U.S. 225, the Court based its conclusion that 42 U.S.C. 1983 is an express exception to the anti-injunction statute, 28 U.S.C. 2283, on the historical fact that Section 1983 was "a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted" (*id.* at 242). That statute "goes back almost to the beginnings of our history as a Nation" to a provision first enacted in 1793 (*id.* at 231, 232–233 n. 10).[23] Section 1983, however, was modelled after Section 2 of the Civil Rights Act of 1866, 14 Stat. 27, which "was enacted for the express pur-

[23] Similarly, the Eleventh Amendment was adopted in 1798.

pose of 'enforc[ing] the Provisions of the Fourteenth Amendment'" (*id.* at 238). "The predecessor of § 1983," said the Court, "was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established" (*id.* at 238–239).

South Carolina v. *Katzenbach*, 383 U.S. 301, even more explicitly reaffirms Congress' broad powers to enforce the Civil War Amendments. There the plaintiff state challenged the constitutionality of certain remedial provisions of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. 1973 *et seq.*, including (see 383 U.S. at 315–317) the suspension of existing state literacy tests and similar voting qualifications;[24] the suspension of changes in voting requirements pending their submission to and clearance by the Attorney General or their submission to and approval by the United States District Court for the District of Columbia in a declaratory judgment suit;[25] and the assignment of federal examiners upon certification by the Attorney General to list qualified applicants who are thereafter entitled to vote in all elections.[26] Each

[24] Section 4(a), 42 U.S.C. 1973b(a).

[25] Section 5, 42 U.S.C. 1973c.

[26] Sections 6(b), 7, 9, and 13(a), 42 U.S.C. 1973d(b), 1973e, 1973g, and 1973k(a).

of these remedies the Court found rational and appropriate means of enforcing the Fifteenth Amendment, and in so doing pointed up the error behind the attempt by the court of appeals in the instant case to balance the state's claim of sovereign immunity against the legitimate power conferred on the federal government by the Reconstruction Amendments.

There, as here, the state challenged the remedial provisions "on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution" (383 U.S. at 323). There, as here, "[t]he ground rules for resolving [the question whether Congress has exercised its powers in an appropriate manner with relation to the states] are clear" (*id.* at 324). In words equally applicable to the Fourteenth Amendment and the present case, the Court declared, "[t]he language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use *any rational means* to effectuate the constitutional prohibition of * * * discrimination in voting" (*ibid.*; emphasis added).

The court of appeals in the instant case acknowledged (Pet. App. 19a) "that legislation enforcing individual rights under the Fourteenth Amendment must to some extent subject states to private suits," but concluded that "it does not follow that Congress necessarily has power to provide the particular remedy sought here." In *South Carolina* v. *Katzenbach* the state similarly attempted to put the remedies that

Congress might prescribe in enforcement of the Fifteenth Amendment upon an inferior footing to the other powers conferred upon Congress by the Amendment, but the Court, as it did in *Ex parte Virginia, supra,* rejected any attempt to carve out of the Civil War Amendments' enforcement provisions an exception based on claims of state sovereignty. Referring to Section 2 of the Fifteenth Amendment, which like Section 5 of the Fourteenth Amendment authorizes Congress "to enforce this article by appropriate legislation," the Court said (383 U.S. at 325–326; boldface emphasis added):

> By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective." *Ex parte Virginia,* 100 U.S. 339, 345. Accordingly, in addition to the courts, Congress has ***full remedial powers*** to effectuate the constitutional prohibition against racial discrimination in voting.

South Carolina v. *Katzenbach* and *Ex parte Virginia* teach that the court of appeals misconstrued its task in this case. The congressional powers of enforcement conferred by the Fourteenth Amendment are not conditioned upon their harmonious accommodation with state immunity under the Eleventh. The balancing approach applied by the court below would return matters to the very situation that the sponsors of the Fourteenth Amendment sought to remedy: Congress

would be unable fully to enforce rights granted pursuant to the Constitution but interfered with by the states. Rather than attempting to accommodate the Fourteenth Amendment to an earlier constitutional provision it was intended *pro tanto* to override, the court of appeals should have inquired only "whether the specific remedies prescribed in [Title VII] were an appropriate means of combatting the evil" (*South Carolina* v. *Katzenbach, supra,* 383 U.S. at 328) of unlawful discrimination in employment.[27] Indeed, the

[27] It is immaterial to this judicial determination that Congress may have "at its disposal various methods other than private federal damages suits for enforcing Fourteenth Amendment rights" (Pet. App. 20a). Congress is not required to forego the legitimate exercise of one of its constitutional powers simply because an alternative less disagreeable to the states may exist. In any event, the three alternatives suggested by the court of appeals (Pet. App. 21a–22a; *supra*, note 4) are inadequate to the full enforcement of the "congressional command that each employee be free from discriminatory practices" (*Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 51). For the reasons stated in the text immediately following the back pay remedy is equally necessary to enforcement of Title VII as the availability of injunctive relief, which by itself neither deters discrimination before suit nor compensates for past injury. And although the Attorney General is authorized to sue and recover back benefits on behalf of private individuals, Section 706(f)(1), 42 U.S.C. (Supp. IV) 2000e–5(f)(1), the resources of the Justice Department are limited and "the private right of action remains an *essential* means of obtaining judicial enforcement of Title VII" (415 U.S. at 45; emphasis added). Finally, as the court of appeals acknowledged (Pet. App. 21a–22a; footnote omitted), "Congress did not suggest that jurisdiction over private actions under Title VII extends to state courts," and it may be doubtful whether it could compel state courts to award remedies against a state that a federal court could not award. See *Employees* v. *Department of Public Health and Welfare of Missouri, supra,* 411 U.S. at 298 (Marshall, J., concurring). In any event, this Court

remedies of the Voting Rights Act upheld by this Court are far more intrusive upon state sovereignty than the present remedial scheme, which merely subjects public employers to the same liability as other employers for awards of monetary relief of injuries caused by their unlawful employment practices.[28] The monetary remedies of Title VII, therefore, are not to be tested against "contrary exertions of state power," but according to whether they are within Congress' "full remedial powers to effectuate" the Fourteenth Amendment (383 U.S. at 325, 326). If they are an appropriate means of enforcing the Amendment's guarantee of equal protection, they are constitutional.

C. THE RETROACTIVE MONETARY RELIEF AFFORDED BY TITLE VII IS AN APPROPRIATE MEANS OF COMBATTING EMPLOYMENT DISCRIMINATION BY STATE EMPLOYERS

Albemarle Paper Co. v. *Moody*, 422 U.S. 405, removes all doubt from the question whether Title VII's provision for back pay and other forms of

recently noted that "'the choice of forums inevitably affects the scope of the substantive right to be vindicated'" and that "Congress intended *federal* courts to exercise final responsibility for enforcement of Title VII" (*Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 56; emphasis added). That Congress might have conferred some of that responsibility upon state courts does not detract from its constitutional power to enact a remedial scheme that relies primarily or exclusively on federal courts.

[28] See *Connor* v. *Waller*, 421 U.S. 656 (certain Mississippi enactments "are not now and will not be effective as laws until and unless cleared pursuant to § 5" of the Act); *Georgia* v. *United States*, 411 U.S. 526; *id.* at 542, 543 (White, J., dissenting) ("[I]t remains a serious matter that a sovereign State must submit its legislation to federal authorities before it may take effect"); *id.* at 545 (Powell, J., dissenting).

retroactive monetary relief is an appropriate and legitimate response to the problem of discrimination in employment. Although that case involved a private employer, its rationale is fully applicable to state employers as well.

At issue in that case was the appropriate standard to be followed by a district court in determining whether to award or deny back pay. The Court began by noting that the power to make such an award was bestowed upon the courts "as part of a complex legislative design directed at a historic evil of national proportions" (422 U.S. at 416), and that the district court's decision must "be measured against the purposes which inform Title VII" (*id.* at 417). These purposes were found to be two: the prophylactic purpose of eradicating employment discrimination throughout the nation, and the "make whole" purpose of fully compensating persons for past injuries suffered on account of such discrimination (see *id.* at 417–422). Beyond its apparent relation to the latter, the back pay remedy was held to have an "obvious connection" with the former: "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'" (*id.* at 417–418).

Thus, the back pay remedy was deemed critical to "the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination" (422 U.S. at 421, footnote omitted). The Court accordingly ruled that such relief should be denied only for reasons which if generally applied would not frustrate these twin statutory objectives (*ibid.*). And the mere absence of bad faith by the employer was held to be no barrier to back pay, for "[to] condition the awarding of backpay on a showing of 'bad faith' would be to open an enormous chasm between injunctive and backpay relief under Title VII. There is nothing on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between those two remedies" (*id.* at 423; footnote omitted).

Nothing in *Albemarle Paper Co.* v. *Moody* suggests that its interpretation of Title VII is any less applicable to public than to private employers. Both may reasonably be expected to need the "spur or catalyst" afforded by the prospect of retroactive monetary relief to prompt the reevaluation of existing practices and the avoidance of any that appear "of dubious legality" (422 U.S. at 417). Certainly public no less than private employees suffer economic injuries as a result of unlawful employment discrimination. Thus, when Congress amended Title VII in 1972 to bring states within its coverage, it acted with the reasonable belief "that the employees of State and local governments are entitled to the same benefits and protections

in equal employment as are employees in the private sector." [29]

In short, the remedial provisions of Title VII, including those authorizing back pay and other retroactive monetary relief, are "an appropriate means of combatting the evil" (*South Carolina* v. *Katzenbach, supra,* 383 U.S. at 328) of discrimination in both public and private employment. They are therefore a legitimate exercise of Congress' "full remedial powers to effectuate the constitutional prohibition against" discrimination in employment (*id.* at 326), and the court of appeals erred in finding their enactment beyond Congress' authority in face of the defendant state's claim of sovereign immunity.

D. EDELMAN V. JORDAN IS INAPPLICABLE

In *Edelman* v. *Jordan,* 415 U.S. 651, this Court ruled that private plaintiffs could not recover retroactive welfare benefits wrongfully withheld by the state. That decision, however, did not address the argument under Section 5 of the Fourteenth Amendment presented here. Unlike the present situation, where Congress has authorized a private plaintiff's suit for retroactive monetary relief, in *Edelman* the Court found that "the threshold fact of congressional authorization to sue * * * is wholly absent" (*id.* at 672). Accordingly, that decision did not either expressly or by implication pass upon the issues that now face the Court.

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[29] Remarks by Senator Williams, 118 Cong. Rec. 1815 (1972); see *supra*, pp. 18–19.

In *Edelman* there were, within the overall issue of plaintiffs' entitlement to monetary relief, two distinct questions presented: (1) was the suit directly against the state for purposes of the Eleventh Amendment, or against state officials within the doctrine of *Ex parte Young*, 209 U.S. 123 (see 415 U.S. at 663–671); and (2) if it was a suit against the state, had whatever immunity that the state might otherwise enjoy been abrogated (see *id.* at 671–677). The doctrine announced in *Ex parte Young* did not override the Eleventh Amendment;[30] it declared, rather, that a suit to enjoin a state official from carrying out an unconstitutional statute was not a suit against the state for purposes of the Eleventh Amendment. See 209 U.S. at 150–160. In resolving the first question in *Edelman* then, the Court was merely characterizing the suit: if it were governed by *Ex parte Young* then the state's sovereign immunity was not implicated at all and the inquiry would come to an end; only if it were governed by the Eleventh Amendment would it be necessary to reach the question whether the state's immunity under that Amendment had been abrogated. The Court found *Ex parte Young* inapposite, and thus proceeded to the issue of abrogation.

[30] Although *Ex parte Young* arose out of a complaint brought under the Fourteenth Amendment by shareholders of a railroad seeking to enjoin enforcement of illegally confiscatory rates set by the state, the Court said that "a decision in this case does not require an examination or decision of the question whether [adoption of the Fourteenth Amendment] in any way altered or limited the effect of the [Eleventh] Amendment" (209 U.S. at 150).

In finding *Ex parte Young* inapplicable the Court to that extent overruled several of its previous decisions[31] in which retroactive monetary awards against states had been allowed (see 415 U.S. at 671), and the court of appeals in the instant case suggested (Pet. App. 22a–23a) that, since those decisions involved Fourteenth Amendment claims, in overruling them the Court may have foreclosed the arguments made herein. But the overruling of those cases, when considered in context, was meant merely to strip them of any support they may have lent to the notion that *Ex parte Young* authorized suits against states by private individuals seeking retroactive monetary relief. The Court's opinion in *Edelman* had not yet reached the question whether the state's immunity had been abrogated, and when it did the Fourteenth Amendment was never mentioned. In any event, neither *Edelman* v. *Jordan* nor the cases overruled therein involved an exercise of the congressional power under Section 5 of the Fourteenth Amendment to authorize appropriate remedies for enforcement of the Amendment's substantive provisions. Thus, in overruling those cases "to the extent that they are inconsistent with" the ruling on the *Ex parte Young* issue, the Court in *Edelman*

[31] *State Dept. of Health and Rehabilitative Services* v. *Zarate*, 407 U.S. 918, affirming 347 F. Supp. 1004 (S.D. Fla.); *Sterrett* v. *Mothers' and Children's Rights Organization*, 409 U.S. 809, affirming unreported order and judgment (N.D. Ind.) on remand from *Carpenter* v. *Sterrett*, 405 U.S. 971; *Gaddis* v. *Wyman*, 304 F. Supp. 717 (S.D. N.Y.), affirmed *sub nom.* *Wyman* v. *Bowens*, 397 U.S. 49; *Shapiro* v. *Thompson*, 394 U.S. 618.

(415 U.S. at 671) neither considered nor rejected the arguments made here.[32]

II

THE ELEVENTH AMENDMENT DOES NOT BAR THE AWARD OF ATTORNEY'S FEES AS PART OF THE COSTS IN A TITLE VII SUIT BROUGHT BY A STATE EMPLOYEE

Title VII expressly authorizes the district court to allow the prevailing party "a reasonable attorney's fee as part of the costs" of any enforcement action brought under the statute's provisions. Section 706(k), 42 U.S.C. 2000e–5(k). Here the district court found that "while the counsel fees requested are fair and reasonable in amount," they are "tantamount to an award of money damages" and therefore "are not allowable as a recoverable expense against the State" (Cross-Pet. App. 21a, 23a). The court of appeals reversed, holding that, under this Court's decision in *Edelman* v. *Jordan, supra,* an award of attorney's fees has only an "ancillary effect" on the state treasury and as such does not disturb the state's sovereign immunity within the meaning of the Eleventh Amendment (Pet. App. 23a–24a).

We submit that this ruling was correct. Under the long-standing doctrine of *Ex parte Young,* 209 U.S. 123, equitable relief may be secured against the enforcement of an unconstitutional state statute notwithstanding the cost of the litigation to the state as well as any incidental drain on the state treasury

[32] Indeed, Mr. Justice Marshall, dissenting, expressly noted that the relationship between the Fourteenth and Eleventh Amendments was not decided, see 415 U.S. at 694, n. 2.

resulting from the cost of compliance with the court's mandate. *Edelman* v. *Jordan, supra,* 415 U.S. at 668. An award of attorney's fees is in the same general category and is not, as the district court mistakenly believed, the equivalent of money damages designed to redress or punish past misconduct. Rather, attorney's fees are analytically similar to other litigation costs, which this Court has held may be taxed against states. *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70.

These principles, which underlie the ruling on this issue by the court of appeals here, were recognized by this Court when it approved *Sims* v. *Amos,* 340 F. Supp. 691 (M.D. Ala.), summarily affirmed, 409 U.S. 942, over the state's objection that the award of counsel fees against it violated its sovereign immunity.

Even if this Court should determine, however, that an award of attorney's fees in a case such as this one does not fall within the rationale of *Ex parte Young,* but instead amounts to an assessment against the state within the meaning of the Eleventh Amendment, the award is nonetheless within Congress' power to authorize for the reasons stated in the first part of this brief. The availability of counsel fees is essential to the remedial scheme of Title VII, and their authorization accordingly is an appropriate exercise of the enforcement powers granted to Congress by Section 5 of the Fourteenth Amendment.

A. AN AWARD OF ATTORNEY'S FEES HAS ONLY AN ANCILLARY EFFECT UPON THE STATE TREASURY

The Court in *Edelman* v. *Jordan, supra,* while acknowledging that "the difference between the type

of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night" (415 U.S. at 667), nonetheless provided considerable guidance for distinguishing the two by describing the salient characteristics of each. The sort of relief that is barred is "a liability which must be paid from public funds" (*id.* at 663); "an accrued monetary liability which must be met from the general revenues" (*id.* at 664); "payment of a very substantial amount of money which * * * should have been paid, but was not" (*ibid.*); "'use [of] state funds to make reparation for the past'" (*id.* at 665); "retroactive payments" (*id.* at 666 n. 11); and "payment of state funds * * * as a form of compensation" (*id.* at 668). These characteristics lead to the general conclusion that money relief is barred when "it is in practical effect indistinguishable in many aspects from an award of damages against the State" (*ibid.*).

An award of attorney's fees does not share these characteristics. It is not akin to damages: it is intended neither to compensate the victims of nor to punish the state for past illegal conduct.

Rather, the award of counsel's fees is much closer to the sort of draw upon the state treasury, permitted by *Ex parte Young* and *Edelman* v. *Jordan,* which comes about as the "necessary consequence of compliance in the future with a substantive federal-question determination" (415 U.S. at 668; see also *id.* at 665). While the payment of attorney's fees is not identical to the increased funding of state programs

required as a practical matter in result of this Court's decisions in *Graham* v. *Richardson,* 403 U.S. 365, and *Goldberg* v. *Kelly,* 397 U.S. 254 (see 415 U.S. at 667–668), the differences militate in favor of the inclusion of attorney's fees among the genre of awards allowable. As the Court said in *Edelman* v. *Jordan,* "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature" (415 U.S. at 667–668). The prospect of an award of counsel fees, which generally speaking begin to accrue only at the outset of the litigation, is in many cases a necessary prerequisite to the bringing of the suit itself. If the Eleventh Amendment does not protect the states from having "to spend money from the state treasury" "in order to shape [its] conduct to the mandate of the Court's decrees," then surely it should not be the basis for defeating such suits in the first place, which would be the likely result of a rule barring awards of attorney's fees against the states. In short, such an award, like the fiscal consequence to the state resulting from the necessity to comply with a judicial decree, has only "an ancillary effect on the state treasury [which] is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*" (415 U.S. at 668).[33]

[33] See, in addition to the decision below, *Souza* v. *Travisono,* 512 F. 2d 1137 (C.A. 1); *Class* v. *Norton,* 505 F. 2d 123, 125 (C.A. 2); *Jordan* v. *Fusari,* 496 F. 2d 646, 651 (C.A. 2); *Sims* v. *Amos,* 340 F. Supp. 691, affirmed, 409 U.S. 942. The Seventh Circuit follows the same rule, finding *Sims* v. *Amos, supra,* controlling, *Bond* v. *Stanton,* No. 75–1459, decided January 7,

This result in many respects merely restates the doctrine of *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70, where the state attempted to assert its sovereignty as a bar to an award of costs against it.[34] This Court held that it was justified "in treating the state just as any other litigant and in imposing costs upon it as such" (*id.* at 77) since the case was brought not

1976, as does the Ninth, *Brandenburger* v. *Thompson*, 494 F. 2d 885. See also *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F. 2d 1017 (C.A. 1), certiorari denied, 421 U.S. 910.

The rule in the Fifth Circuit is unsettled, see *Gates* v. *Collier*, 522 F. 2d 81, and *Newman* v. *State of Alabama*, 522 F. 2d 71, both decided October 29, 1975 (*en banc*), vacating the judgment of the district court in each case as it related to attorney's fees and remanding for reconsideration in light of this Court's decisions in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, and *Edelman* v. *Jordan*, *supra*.

The Sixth Circuit has held that a state's immunity bars an award of attorney's fees, *Jordon* v. *Gilligan*, 500 F. 2d 701, certiorari denied, 421 U.S. 991, relying on *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F. 2d 31 (C.A. 3), vacated and remanded for further consideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, and *Wood* v. *Strickland*, 420 U.S. 308, 421 U.S. 983. A subsequent Sixth Circuit decision to like effect, *Taylor* v. *Perini*, 503 F .2d 899, was vacated and remanded for futher consideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, alone, 421 U.S. 982.

[34] At least where, as here, the underlying statute provides for an award of attorney's fees, we perceive no analytical difference between costs and attorney's fees for purposes of considering whether they are allowed by *Ex parte Young* or barred by the Eleventh Amendment. See *Souza* v. *Travisono*, *supra*, 512 F. 2d at 1140; *Class* v. *Norton*, *supra*, 505 F. 2d at 125; *Taylor* v. *Perini*, *supra*, 503 F. 2d at 909 (Edwards, J., dissenting). Indeed, the applicable statutory provision here, Section 706(k), 42 U.S.C. 2000e–5(k), provides for an award of attorney's fees "as part of the costs."

"by the state's consent but by virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such" (275 U.S. at 74). It should be no different in any federal court. "[T]o the extent states and state officials are, under our federal system, amenable to suit in federal courts, they should be responsible for costs and fees incidental to litigation to the same degree as others" (*Souza* v. *Travisono,* 512 F. 2d 1137, 1140 (C.A. 1)).

Indeed, this Court has already affirmed a decision reaching this result, *Sims* v. *Amos,* 340 F. Supp. 691 (M.D. Ala.), summarily affirmed, 409 U.S. 942. There the district court taxed attorney's fees against the state, ruling that a state was without immunity in suits brought under the doctrine of *Ex parte Young*. In its jurisdictional statement the state protested the award as an unlawful abrogation of its sovereign immunity, and this Court's affirmance therefore should be read as having passed on the merits of that issue.[35] Cf. *Hicks* v. *Miranda,* 422 U.S. 332, 344–345.

[35] The Seventh Circuit so held in *Bond* v. *Stanton*, *supra*, note 33. *Brandenburger* v. *Thompson*, *supra*, 494 F. 2d at 888, also relied on *Sims* v. *Amos* in holding attorney's fees allowable. See also *Taylor* v. *Perini*, *supra*, 503 F. 2d at 907–908 (Edwards, J., dissenting) (affirmance in *Sims* binding); *Newman* v. *State of Alabama*, *supra*, 522 F. 2d at 72–80 (Gewin, Brown, Wisdom, Thornberry, Goldberg, J.J., dissenting from remand for reconsideration of attorney's fees issue) (*semble*). Contra, *Skehan* v. *Board of Trustees of Bloomsburg State College*, *supra*, 501 F. 2d at 42 n. 7; *Jordon* v. *Gilligan*, *supra*, 500 F. 2d at 706–709; *Taylor* v. *Perini*, *supra*, 503 F. 2d at 905 (by implication).

B. CONGRESS HAS THE POWER UNDER THE FOURTEENTH AMENDMENT TO PROVIDE FOR AN AWARD OF ATTORNEY'S FEES AGAINST A STATE

If this Court should decide, contrary to the foregoing argument, that an award of attorney's fees has more than an ancillary effect upon the state treasury, and is not protected by the doctrine of *Ex parte Young* from the state's claim of sovereign immunity, then the question becomes whether Congress has the power under the Fourteenth Amendment to provide for such awards as an essential element of a statutory scheme to enforce that Amendment's guarantees. For the reasons stated in point I, *supra,* we submit that Congress has such authority.

Title VII was designed to be "a comprehensive solution for the problem of invidious discrimination in employment" (*Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454, 459). Although both the Equal Employment Opportunity Commission and the Attorney General are given enforcement responsibilities (see *supra,* pp. 14–15), Congress intended that aggrieved employees would play a central role in the statutory scheme and to that end provided "assistance in investigation, conciliation, counsel, waiver of court costs, and attorneys' fees" (*id.* at 460). Indeed, "the private right of action remains an essential means of obtaining judicial enforcement of Title VII. * * * In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices" (*Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 45). Thus, this is an instance where "Congress has opted to rely

heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation" (*Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 263).

In so doing, Congress reasonably exercised its authority to enforce the prohibitions of the Fourteenth Amendment by appropriate legislation. *Ex parte Virginia, supra,* 100 U.S. at 346. The resources of the Executive Branch are inadequate to alleviate fully the "historic evil of national proportions" of employment discrimination (*Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 416), and private enforcement is thus essential to vindication of the congressional goal of "eradicating discrimination throughout the economy" (*id.* at 421). Private litigants cannot be expected to play the critical role envisaged for them, however, if access to the judicial forum is effectively denied or even discouraged by the prospect that financial hardship will accompany their efforts. This is especially true in cases where only injunctive relief is sought, but even a private litigant who seeks back pay or other monetary relief may be unwilling to risk the possibility that attorney's fees will substantially offset or even exceed the amount of any monetary recovery.

In *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 415, this Court recognized the "strong public interest" in private enforcement of Title VII, and noted that this interest "can be vindicated by applying" to the attorney's fees provision of Title VII the standards enunciated in *Newman* v. *Piggie Park Enter-*

prises, Inc., 390 U.S. 400, for the award of attorney's fees under Section 204(b) of Title II of the Civil Rights Act of 1964, 78 Stat. 244, 42 U.S.C. 2000a-3(b). In that case the Court stated (390 U.S. at 401–402; footnote omitted):

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. * * * If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

Thus, the availability of attorney's fees is integral to the enforcement of Title VII, and in providing for them Congress chose a "rational means to effectuate the constitutional prohibition of" discrimination in employment (*South Carolina* v. *Katzenbach, supra,*

383 U.S. at 324). The provision is, accordingly, an appropriate exercise of the enforcement power conferred on Congress by Section 5 of the Fourteenth Amendment; it follows that the award of attorney's fees here is not barred by the state's claim of sovereign immunity.

CONCLUSION

The judgment below should be reversed insofar as it disallows an award of retroactive monetary relief against the state, and affirmed insofar as it allows an award of attorney's fees.

Respectfully submitted.

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FEBRUARY 1976.

APPENDIX

EXCERPTS FROM CONGRESSIONAL DEBATES ON THE RECONSTRUCTION AMENDMENTS AND IMPLEMENTING LEGISLATION

I. THE THIRTEENTH AMENDMENT

A. Congressman Chilton A. White, speaking in opposition (Cong. Globe, 38th Cong., 2d Sess. 215 (1865)):

> Sir, I am a believer to the fullest extent in that doctrine which has been denounced upon this floor as a damnable heresy—the absolute, unqualified sovereignty of the States. And I believe it is because these States are absolutely and exclusively sovereign that they may, in the exercise of their sovereignty delegated to conventions for the purpose, dispose of this institution of slavery, and that, too, consistently with this provision written down in the tenth amendment of the Constitution of the United States.

B. Congressman Samuel S. Cox, speaking in opposition (Cong. Globe, 38th Cong., 2d Sess. 242 (1865)):

> Do you not break down, by this amendment, the distinction between the spheres of the State and national Governments, which is characteristic of our system, as old as our Union? If so, are we not asked to change the system, rather than to abolish slavery?
>
> Hence, I do not place my suggestions about this measure on any ground of the immutability of the Constitution, or of our peculiar system. I place my vote against it, because the system it would change is a good one, made in wisdom and to be perpetuated for the future happiness of the people. If the system of internal police over State matters is not of value, discard it altogether. Deny to Ohio her right to declare

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who are born in wedlock, and who may inherit estates; deny to us the right to have our home courts for home justice; centralize all power here, in one head, and make the federation a despotic tyranny, and thus you will have the "gospel of anarchy, the philosophy of dissolution."

C. Congressman Anson Herrick, speaking in support (Cong. Globe, 38th Cong., 2d Sess. 525 (1865)):

> By the adoption of that Constitution the States transferred to three fourths of their number their entire sovereignty, which can be at any time exerted to augment or diminish the functions of the General Government, save in the two particulars excepted by special limitation. Three fourths of the States can, by an amendment of the Constitution, exercise throughout the United States any power that a State individually can exercise within its own limits.

II. THE FOURTEENTH AMENDMENT

A. Congressman Andrew J. Rogers, a member of the Joint Committee on Reconstruction, which reported out the Amendment, speaking in opposition (Cong. Globe, 39th Cong., 1st. Sess., App. 134–135 (1866)):

> This is but another attempt to consolidate the power of the States in the Federal Government. It is another step to an imperial despotism. It is but another attempt to blot out from that flag the eleven stars that represent the States of the South and to consolidate in the Federal Government, by the action of Congress, all the powers claimed by the Czar of Russia or the Emperor of the French. * * *
>
> * * * * *
>
> But this act of Congress proposes to amend the Constitution so as to take away the rights of the States with regard to the life, liberty,

> and property of the people, so as to enable and empower Congress to pass laws compelling the abrogation of all the statutes of the States which makes a distinction, for instance, between a crime committed by a white man and a crime committed by a black man, or allow white people privileges, immunities, or property not allowed to a black man.
>
> * * * * *
>
> All men who are honest, and love their country, and who believe in the doctrines upon which the constitutional liberty of this country is founded, must admit that the rights of the States were the most jealous rights which our fathers had in view; and when they wrested from England the independence of the several States, they wrested them as thirteen independent States and nations, free from each other, with all rights and privileges given to the people to exercise, carry into effect, and control a Government according to their own exclusive will and judgment.

B. Congressman Robert S. Hale, speaking in opposition (Cong. Globe, 39th Cong., 1st Sess. 1063–1065 (1866)):

> It does seem to me that the tenor and effect of the amendment proposed here by this committee is to bring about a more radical change in the system of this Government, to institute a wider departure from the theory upon which our fathers formed it than ever before was proposed in any legislative or constitutional assembly. * * *
>
> * * * * *
>
> What is the effect of the amendment which the committee on reconstruction propose for the sanction of this House and the States of the Union? I submit that it is in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure,

affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead. I maintain that in this respect it is an utter departure from every principle ever dreamed of by the men who framed our Constitution.

* * * * *

It was not within the purview of the original Constitution to grant the power of legislation to Congress on subjects of this character. Mr. Speaker, the powers conferred on Congress are all contained in the eighth section of the first article of the Constitution. I ask the House to look at these provisions, their nature, their general scope, the accuracy, precision, and care with which they are defined, and compare them with what I cannot but characterize, with all my respect and deference for the committee on reconstruction, as the extremely vague, loose, and indefinite provisions of the proposed amendment.

* * * * *

I believe that this is, of all times, the last when we should undertake a radical amendment of the Constitution, so immensely extending the power of the Federal Government, and derogating from the power of the States.

* * * But let me warn gentlemen that there are other liberties as important as the liberties of the individual citizen, and those are the liberties and rights of the States. * * * I appeal to gentlemen whether we ought not now to seek to strengthen the liberties of the States and the rights of the States as well as the liberties of the citizen.

C. Congressman Thomas T. Davis, speaking in opposition (Cong. Globe, 39th Cong., 1st Sess. 1083 (1866)):

> I am, moreover, especially opposed to any amendment which may prove subversive of the principles on which the Government is founded. We are the Representatives of States in this Union, and as such are under solemn obligations to see that while the national sovereignty of the Union is preserved, no infringement on the reserved rights of the States shall be permitted.

D. Congressman Frederick E. Woodbridge, speaking in support (Cong. Globe, 39th Cong., 1st Sess. 1088 (1866)):

> It does not destroy the sovereignty of a State, if such a thing exists. It does not even affect its sovereign rights, but merely keeps whatever sovereignty it may have in harmony with a republican form of government and the Constitution of the country.

E. Congressman John A. Bingham, who was a member of the Joint Committee on Reconstruction and who drafted what are now Sections One and Five of the Amendment, speaking in support (Cong. Globe, 39th Cong., 1st Sess. 1088–1090 (1866)):

> I repel the suggestion made here in the heat of debate, that the committee or any of its members who favor this proposition seek in any form to mar the Constitution of the country, or take away from any State any right that belongs to it, or from any citizen of any State any right that belongs to him under that Constitution. The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. * * *
>
> * * * * *
>
> But the gentleman reiterates the old cry of State rights, and says, "You are impairing State rights." I would like to know, and when the gentleman comes to make another argument

on this subject, I respectfully ask him to inform us whence he derives the authority for supposing, if he does so suppose, that any State has the right to deny to a citizen of any other State any of the privileges or immunities of a citizen of the United States. And if a State has not the right to do that, how can the right of a State be impaired by giving to the people of the United States by constitutional amendment the power by congressional enactment to enforce this provision of their Constitution?

* * * * *

The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? That is the question, and the whole question. The adoption of the proposed amendment will take from the States no rights that belong to the States. They elect their Legislatures; they enact their laws for the punishment of crimes against life, liberty, or property; but in the event of the adoption of this amendment, if [State officials] conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellow-men.

F. Congressman John A. Nicholson, speaking in opposition (Cong. Globe, 39th Cong., 1st Sess. 2080 (1866)):

> Thus we possess a system of government, which, to a foreign observer, may appear artificial and complex, but which to us, who are furnished with the key, is simple in the extreme. That key is the jealousy which has been apparent through all our history, for the right of each State to control its own domestic affairs, and

> the firmness with which that right has always been maintained.
>
> From all these various conflicting causes harmony has been evoked; and the most perfect equilibrium is presented to our view in the equal distribution of the Federal powers, in the limitation upon State and Federal power, and the line that is drawn between them; like that huge mass of rock which nature has so nicely poised that a child's hand can disturb its balance, but a giant's strength could not move it from its base.
>
> That nicely adjusted balance is now, by this amendment, to be permanently overthrown. The line of demarkation between State and Federal power, which has been already too much obscured by the great latitude of construction given of late to the several grants of power, is now to be entirely obliterated.

G. Congressman Thaddeus Stevens, a member of the Joint Committee on Reconstruction, speaking in support (Cong. Globe, 39th Cong., 1st Sess. 2459 (1866)):

> I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.

H. Congressman John M. Broomall, speaking in support (Cong. Globe, 39th Cong., 1st Sess. 2498 (1866)):

> We propose, first, to give power to the Government of the United States to protect its own citizens within the States, within its own juris-

diction. Who will deny the necessity of this? No one.

I. Congressman Thomas D. Eliot, speaking in support (Cong. Globe, 39th Cong., 1st Sess. 2511 (1866)):

> I support the first section [36] because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the States the equal protection of the laws, then, in my judgment, such power should be distinctly conferred.

J. Congressman Andrew J. Rogers of the Joint Committee on Reconstruction, speaking in opposition (Cong. Globe, 39th Cong., 1st Sess. 2538 (1866)):

> Now, sir, I have examined these propositions with some minuteness, and I have come to the conclusion different to what some others have come, that the first section of this programme of disunion [37] is the most dangerous to liberty. It saps the foundation of the Government; it destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of the States, and which have characterized this Government and made it prosperous and great during the long period of its existence.
>
> This section of the joint resolution is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill which passed both Houses of Congress and was vetoed

[36] Sections 1 and 5 of the Fourteenth Amendment were at that time consolidated in the first section of the proposed resolution.

[37] See note 36.

> by the President of the United States upon the ground that it was a direct attempt to consolidate the power of the States and to take away from them the elementary principles which lie at their foundation.

K. Congressman John A. Bingham, speaking in support (Cong. Globe., 39th Cong., 1st Sess. 2542–2543 (1866)):

> The necessity for the first section of this amendment [38] to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.
>
> Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy.
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[38] See p. 58 n. 36, *supra*.

> That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. That is the extent that it hath, no more; and let gentlemen answer to God and their country who oppose its incorporation into the organic law of the land.

L. Senator Jacob M. Howard, a member of the Joint Committee on Reconstruction, speaking in support (Cong. Globe, 39th Cong., 1st Sess. 2765–2766 (1866)):

> Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. * * *
>
> Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel

> them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is one by the fifth section of this amendment, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.

M. Senator Luke P. Poland, speaking in support of the Fourteenth Amendment (Cong. Globe, 39th Cong., 1st Sess. 2961 (1866)):

> The clause of the first proposed amendment, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," secures nothing beyond what was intended by the original provision in the Constitution, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."
>
> But the radical difference in the social systems of the several States, and the great extent to which the doctrine of State rights or State sovereignty was carried, induced mainly, as I believe, by and for the protection of the peculiar system of the South, led to a practical repudiation of the existing provision on this subject, and it was disregarded in many of the States. State legislation was allowed to override it, and as no express power was by the Constitution granted to Congress to enforce it, it became really a dead letter. The great social and political change in the southern States wrought by the amendment of the Constitution abolish-

ing slavery and by the overthrow of the late rebellion render it eminently proper and necessary that Congress should be invested with the power to enforce this provision throughout the country and compel its observance.

* * * * *

It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States, and I cannot doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress.

N. Senator Garrett Davis, speaking in opposition (Cong. Globe, 39th Cong., 1st Sess., App. 240 (1866)):

> The next branch, "nor shall any State deprive any person of life, liberty, or property without due process of law," is objectionable, because in relation to her own citizens it belongs to each State exclusively, as being of her own reserved sovereignty and rights, to regulate that matter.

O. Congressman Jehu Baker, speaking in support of the due process and equal protection clauses of the Fourteenth Amendment (Cong. Globe, 39th Cong., 1st Sess., App. 256 (1866)):

> How clearly right and necessary to liberty is this! The Constitution already declares generally that no person shall "be deprived of life, liberty, or property without due process of law." This declares particularly that no *State* shall do it—a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue.

III. ANTI-KU KLUX KLAN BILL

A. Congressman John A. Bingham, speaking of the effect of the Reconstruction Amendments (Cong. Globe, 42d Cong., 1st Sess., App. 83–85 (1871)).

> The powers of the States have been limited and the powers of Congress extended by the last three amendments of the Constitution. These last amendments—thirteen, fourteen, and fifteen—do, in my judgment, vest in Congress a power to protect the rights of citizens against States, and individuals in States, never before granted. It is my purpose, as far as I may be able in the limited time allowed me, to make this statement good.
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> The fourteenth amendment concludes as follows:
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> "The Congress shall have power, by appropriate legislation to enforce the provisions of this article."
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> This is the grant of power. It is full and complete. The gentleman says that amendment differs from the amendment reported by me in February; differs from the provision introduced and written by me, now in the fourteenth article of amendments. It differs in this: that it is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition.
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> Let gentlemen consider the last three amendments and the new limitations thereby imposed upon the power of the States, and the new powers thereby vested in Congress. The first of

these (the thirteenth) provides that involuntary servitude, or slavery, shall not exist in the United States. That is negative. Then we have the further provision that Congress shall have power to enforce, by appropriate legislation, this amendment. That is affirmative. Do gentlemen undertake to say to day that this does not impose a new limitation upon the power of the States, and grant a new power to Congress?

Does the gentleman from Indiana [Mr. KERR] wish to be understood as affirming that there is no new grant of power here to Congress and no new limitation on the State? I rather think not.

U.S. GOVERNMENT PRINTING OFFICE: 1976